STATE OF MICHIGAN

COURT OF APPEALS

ALICE K. PETERS,

Plaintiff-Appellant,

and

DEBBIE R. TEBBE and RICHARD GARGULINSKI,

Plaintiffs,

v

ELECTRONIC DATA SYSTEMS CORPORATION, ROBERT NOVAK, DAWN PFAFF, MIKE MCDONALD and CAROL MEDLEY,

Defendants-Appellees.

UNPUBLISHED
February 15, 2000

No. 207529
Wayne Circuit Court
LC No. 95-512812 CZ

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

Plaintiff, Alice K. Peters, appeals as of right the trial court's amended order granting dismissal with prejudice in this age discrimination action. We affirm.

I

Defendant EDS hired plaintiff in 1985. She alleges that she was a competent employee from the time of her hire until mid-1992. In 1991, plaintiff was promoted to the position of quality consultant. She also alleges that, prior to her promotion, she had received favorable performance reviews in her position as systems engineer. However, after being promoted, it became apparent that she was unable to meet the requirements of the job. Plaintiff was referred to the EDS employee assistance program to meet with a counselor regarding personal problems, and she was placed on probation with hopes of

improving her performance. Plaintiff admitted in her deposition that she may have been in over her head in the new position and that her supervisors had spoken to her regarding her performance on at least two occasions prior to her discharge. EDS claims that plaintiff was discharged as part of a reduction in workforce.

In response to defendants' motion for summary disposition, plaintiff claimed that EDS' proffered reasons for discharging her were mere pretext and that EDS' true motivation for letting her go was her age. In an effort to support her argument, plaintiff presented a statistical analysis of the entire strategic business unit to which her department was attached. The statistics were compiled for litigation pending in Dayton, Ohio, and included employees in different job positions, different locations, and under different supervisors. The only factors reviewed by the statistician were age and the employees' last performance ratings. The statistics did not account for the date of the last review or any of the subjective factors the immediate supervisors considered when they decided which positions to eliminate and which employees to include in the workforce reduction. The trial court determined that plaintiff established a prima facie case of discrimination, but that she was not able to overcome defendant EDS' proffered reasons for her discharge. The trial court determined that the statistics presented by plaintiff did not establish pretext or a discriminatory motive, and granted defendants' summary disposition motion.

II

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Motions under MCR 2.116(C)(10) test the factual support of the plaintiff's claim.[1] *Id.* The court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted to determine whether a genuine issue of any material fact exists to warrant a trial. *Id.* Both this Court and the trial court must resolve all reasonable inferences in the nonmoving party's favor. *Bertrand v Allan Ford*, 449 Mich 606, 618; 537 NW2d 185 (1995).

The Michigan Supreme Court has adopted what is known as the "intermediate position" for determining the proper summary disposition standard for employment discrimination claims. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 175; 579 NW2d 906 (1998). Under this position, a plaintiff's rebuttal of an employer's articulated reason for the adverse employment decision will defeat summary disposition only if the plaintiff can also demonstrate that discriminatory animus was a motivating factor underlying defendants' decision. *Id.* That is, plaintiff here cannot merely raise a triable issue that EDS' proffered reasons were pretextual, but also that they were a pretext for age discrimination. *Id.* Viewing the evidence in the light most favorable to plaintiff, this Court must decide whether plaintiff proved discrimination with admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for defendants' decision to terminate plaintiff's employment. *Id.*

The Michigan Elliott-Larsen Civil Rights Act, MCL 37.2202; MSA 3.548 (202), provides:

(1) An employer shall not do any of the following:

> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

When a plaintiff claims employment discrimination on the basis of age, the plaintiff's age need not be the only reason or main reason for discharge, but must be one of the reasons that made a difference in determining whether to discharge the person. *Matras v Amoco Oil Co*, 424 Mich 675, 682; 385 NW2d 586 (1986). The question is whether age was a determining factor in the discharge. *Barnell v Taubman Co, Inc*, 203 Mich App 110, 121; 512 NW2d 13 (1993). Plaintiff has not alleged that age was a criteria used to determine which employees would be included in the workforce reduction, but, rather, only that a disproportionate number of older workers were included in the reduction.

An age discrimination claim can be based on two theories: (1) disparate treatment, which requires a showing of either a pattern of intentional discrimination against protected employees, e.g., employees older than forty years, or against an individual plaintiff; or (2) disparate impact, which requires a showing that an otherwise facially neutral employment policy has a discriminatory effect on members of a protected class. *Lytle*, *supra* at 177 n 26. The trial court ruled that plaintiff was limited to a disparate treatment theory of recovery. Although we do not agree, plaintiff has not appealed this portion of the trial court's ruling and we will not address it here.[2]

To establish a prima facie case of discrimination, plaintiff must prove by a preponderance of the evidence that (1) she was a member of the protected class;[3] (2) she suffered an adverse employment action, in this case, termination; (3) she was qualified for the position; and (4) she was discharged under circumstances that give rise to an inference of unlawful discrimination.[4] *Lytle*, *supra* at 172-173. In the context of a reduction in workforce, the fourth requirement is modified to require the plaintiff to offer some "direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." *Barnes v GenCorp Inc*, 896 F2d 1457, 1465 (CA 6, 1990). This evidence may include "showing that persons outside the protected class were retained in the same position." *EEOC v Clay Printing Co*, 955 F2d 936, 941 (CA 4, 1992). In addition, Michigan law requires some evidence that age was a "determinative factor" in the employer's adverse employment action. *McDonald v Union Camp Corp*, 898 F2d 1155, 1160-1161 (CA 6, 1990), citing *Matras*, *supra* at 675.

Here, the trial court held, and defendants concede on appeal, that plaintiff established a prima facie case of discrimination. Once plaintiff sufficiently established a prima facie case, a presumption of discrimination arose. The burden then shifted to EDS to articulate a "legitimate, nondiscriminatory reason" for plaintiff's termination to overcome and dispose of this presumption. *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 252-253; 101 S Ct 1089; 67 L Ed 2d 207 (1981); *Lytle*, *supra* at 173. EDS did so by showing that plaintiff was terminated as part of a reduction in workforce initiated by EDS to reduce expenditures and to increase profits.

Once EDS produced evidence of the reduction in workforce, the presumption of discrimination dropped away, and the burden of production shifted back to plaintiff. *Meagher v Wayne State*

University, 222 Mich App 700, 711-712; 565 NW2d 401 (1997). At this third stage of proof, plaintiff had to show, by a preponderance of admissible direct or circumstantial evidence, that there was a triable issue that EDS' proffered reasons were not true reasons, but were a mere pretext for discrimination. *Lytle*, *supra* at 174. Plaintiffs who are discharged during reductions in force are required to adduce additional proofs in order to establish discrimination. *Meagher*, *supra* at 711-712.

Plaintiff can prove "mere pretext" (1) by showing that the reason(s) had no basis in fact, (2) if the reason(s) had a basis in fact, by showing that they were not actual factors motivating the decision, or (3) if the reason(s) were motivating factors, by showing that they were jointly insufficient to justify the decision. *Meagher*, *supra* at 711-712; *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990). Plaintiff has not been able to prove any of these factors.

Plaintiff attempts to raise a triable issue by claiming that her performance was not deficient. However, she admitted that she was inexperienced in the position to which she had been promoted and that she may have been "in over her head." She also admitted that her supervisors spoke to her regarding her performance on at least two occasions. Plaintiff's poor performance was noted prior to her supervisors' knowledge of the reduction in workforce, and her marginal performance rating was not indicative of actionable discrimination. Plaintiff has not shown that EDS' decision to include her in the workforce reduction was not justified. Even giving plaintiff the benefit of the doubt that her performance was not as bad as defendants make it out to be, "[a] reason honestly described but poorly founded is not a pretext as that term is used in the law of discrimination." *McDonald*, *supra*, 1162, quoting *Pollard v Rea Magnet Wire Co*, 824 F2d 557, 559-61 (CA 7, 1987). Moreover, the soundness of an employer's business judgment may not be questioned as a means of showing pretext. *Dubey*, *supra* at 566.

To prove that the reduction in workforce and plaintiff's unsatisfactory performance were mere pretext, and that her age was a determining factor in EDS' decision to terminate her, plaintiff had to show that she was treated differently from other similarly situated employees. *Lytle*, *supra* at 178. The burden was on plaintiff to show that other employees were similarly situated. *Id.* at 178 n 28. Plaintiff attempted to raise a triable issue by showing she was treated differently than Julie Galletti, a younger employee who was retained in her position of training specialist. In making her sole comparison, plaintiff failed to show that she and Galletti were similarly situated, i.e., "all of the relevant aspects" of her employment situation were "nearly identical" to those of Galletti's employment situation. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997).

Galletti had a different job (writing instruction manuals), she worked in Dayton, and she reported to a different supervisor. She was not part of plaintiff's work group. Moreover, Galletti had demonstrated improvement in her performance since her last review and her work was on an upswing, whereas plaintiff's performance had declined in recent months. Plaintiff and Galletti were not similarly situated in terms of job functions or in terms of their supervisors. Different individuals were responsible for ranking them based on the criteria selected by top management. There was no comparison between the two employees. Moreover, plaintiff offered no proof that she was capable of performing Galletti's job duties or that Galletti replaced her. Accordingly, the two employees were not "nearly identical" on any "relevant aspect" of their respective jobs. *Town*, *supra* at 700.

Plaintiff claims that the statistical evidence she presented showed that EDS' proffered reason for her discharge was pretextual. The use of statistics may be relevant in establishing a prima facie case of discrimination or in showing that the proffered reasons for a defendant's conduct are pretextual. *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973); *Dixon v WW Grainger, Inc*, 168 Mich App 107, 118; 423 NW2d 580 (1988). Appropriate statistical data showing an employer's pattern of conduct toward a protected class as a group can, if unrebutted, create an inference that a defendant discriminated against individual members of the class. *Barnes, supra* at 1466. To do so, the statistics must show a *significant* disparity and eliminate the most common nondiscriminatory explanations for the disparity: the operation of legitimate selection criteria, chance, or the defendant's bias. *Id.* at 1466, 1468. Statistical proof alone, however, cannot determine whether the more likely cause is the defendant's bias or a legitimate selection criteria. *Id.* Plaintiff has not claimed that age was a factor used by EDS to determine which employees would be let go or that any of her supervisors' criticism ever intimated that her poor performance was because of her age.

Plaintiff's statistician claimed that the data proved that the termination affected Dayton employees over age forty at a rate higher than employees thirty-nine and younger. As noted, the statistics presented by plaintiff measured all 1,448 employees in the strategic business unit to which plaintiff's department was attached, which included employees from different locations, in different jobs, and under different supervisors. The only factors considered in compiling the data were the employee's age and his or her performance rating. The statistics did not consider the date of the employee's last performance review, or any of the other factors used by the immediate supervisors in compiling their lists.

The Dayton statistics were not competent to show that plaintiff suffered disparate treatment. Giving the benefit of every reasonable doubt to plaintiff, her proofs do not raise an inference that the reduction in workforce was merely a pretext for discriminatory animus on the part of EDS. *Lytle, supra* at 180. The evidence was not sufficiently probative to allow a jury to believe that EDS intentionally discriminated against plaintiff. *Barnes, supra* at 1465.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Henry William Saad

[1] We infer that the trial court decided the motion under (C)(10), because it went beyond the pleadings and considered the evidentiary support for the parties' claims.

[2] In any event, plaintiff has not identified any employment practice or policy which disproportionately affected older employees.

[3] Persons aged 40 to 70 are presumptively protected. *Pikora v Blue Cross and Blue Shield of Michigan*, 970 F Supp 591, 597 (ED Mich, 1997).

[4] This four-part test is an adaptation of the test established by the United States Supreme Court in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).